SC92564

IN THE SUPREME COURT OF MISSOURI

VICTOR ALLRED,

Respondent/Cross Appellant,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, et al.,

Appellant/Cross Respondent,

And

MISSOURI JOBS WITH JUSTICE,

Respondent/Cross Appellant.

Appeal from the Circuit Court of Cole County
The Honorable Jon E. Beetem

REPLY BRIEF OF APPELLANT/CROSS RESPONDENT AUDITOR THOMAS A. SCHWEICH

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The auditor first disputes that there is any factual issue(s) in determining the constitutionality of §116.175 RSMo. Because the question here is whether the legislature could impose this duty at all upon the auditor (rather than whether an act done under a statute is constitutionally insufficient) the issue here is purely a matter of law. The constitutionality of §116.175 RSMo. cannot depend upon "how good" or "how thorough" or even the method of preparation the auditor uses when doing fiscal notes and fiscal summaries.

Whether the auditor does what Allred or the trial court calls an investigation is not the question. Instead, the first question is what is the meaning of the term "investigation" in Art. IV, § 13. In the absence of a contrary indication, a term in the constitution should be given its plain and ordinary meaning as it would have been understood by the voters in 1945. It also may be presumed that when the same word is utilized multiple times in the constitution it should have the same meaning. The problem with Allred's argument is that he attempts to define "investigation" in terms of what he thinks is a proper investigation of fiscal impact of a proposed initiative. He then extrapolates that opinion to the constitution and concludes that either his meaning is what the voters must have thought in 1945 or investigation as used

in § 116.175 RSMo. was what the legislature meant by investigation. Neither is a correct statement of the issue.

If we look to Webster's Unabridged Dictionary, 3rd ed., "investigate" and "investigation" in governmental usage refer to the conducting of an official inquiry. A synonym is "inquiry". The constitution uses the term investigate or investigation in four different places.[1] A merely cursory review of those sections clearly indicates that the term is used in the sense of conducting an official inquiry. There is no reason to believe the voters meant anything else in Art. IV, §13.

Seen in this light, what the Auditor does in preparing a fiscal note and fiscal summary is certainly an official inquiry. It is performed pursuant to statutory directive. He gathers information from a variety of sources, assembles that information and summarizes it. If that is not enough, then most criminal inquiries could not pass muster as an investigation unless the officer disregarded and left out statements that he didn't find credible and failed to evaluate each statement for reliability and veracity.

In his argument that a fiscal impact inquiry "is not related to the receipt and expenditure of public funds," Allred is forced to argue that the Auditor's role is limited constitutionally to a historical look at an agency or departments

[1] Art. IV, §36(b); Art. V, § 24; Art. VI, §13; Art. VIII, §3.

receipt and expenditure of monies. (Actually receipt would only include Revenue, Treasurer and a few individual funds). And too so he must ignore certain language in Art. IV, § 13 itself. In the second sentence of the provision, the people directed the Auditor to "post-audit the accounts of all state agencies." But that language is totally unnecessary if, as Allred argues, an audit or investigation can *only* be done retrospectively.

Allred fails to make any argument why the unconstitutionality of §116.175 RSMo. should bar this proposal from being submitted to the voters with no fiscal note, or assuming the court finds the fiscal note sufficient, placed on the ballot with the fiscal note no matter who drafted it.

By a 1908 amendment to the 1875 Missouri Constitution, the people of Missouri reserved to themselves the rights of referendum and initiative. An outgrowth of the Populist movement, referendum and initiative reflect a special power of the people to self-govern. Of course, the Missouri Constitution, then and now, only established the right, as it did with many other rights (such as the right to suffrage guaranteed by Art. I, § 25). Protection of those rights and their implementation necessarily and forseeably required that rules and procedures be established by the legislative branch. Our courts have long recognized that the constitutional right of an initiative should have as few obstacles and impediments as possible. "Because the right of initiative is firmly grounded in our constitution, the courts of Missouri have established a

pattern of allowing substantial latitude with regard to the technicalities of seeking to place an initiative measure on the ballot." *Missourians Against Human Cloning v. Carnahan,* 190 S.W.3d 451, 459 (Mo.App. 2006) (Smart, J. concurring in part and dissenting in part). As a consequence, statutes may not limit or restrict the right to initiative. *State ex rel. Elsas v. Mo. Workmen's Comp. Comm.*, 2 S.W.2d 796, 801 (Mo. banc 1998). This court cast the principle in another way in *Missourians to Protect the Initiative Process v. Blunt,* 799 S.W.2d 824, 827 (Mo. banc 1990)." Before the people vote on an initiative, courts may consider only those threshold issues that *affect the integrity of the election* itself and that are so clear as to constitute a matter of form." (emphasis added). The requirement of a fiscal note and fiscal note summary as part of the initiative process (as well as legislation in the General Assembly) arises from statute, not the Constitution. The identity of the author of a fiscal note and fiscal note summary does not call into question the integrity of the election. A few years after *Blunt,* this court reaffirmed its paramount concern is determining whether or not the statute makes an irregularity fatal. *Committee for a Healthy Future, Inc. v. Carnahan*, 201 S.W.3d 503, 509 (Mo. banc 2006). The statute governing fiscal notes specifies no penalty for an irregularity in the preparation of a fiscal note. The *Committee for a Healthy Future* reiterated a long standing principle "that courts will not be astute to make it fatal by judicial construction." *Id.*

In *Thompson,* this court ordered that the proposed initiative be placed on the ballot without a fiscal note. 932 S.W.2d at 395-396. Brown presents no sound argument for the court to overturn that precedent. If the court believes that § 116.175, RSMo. is unconstitutional, it should order the same relief herein. Alternatively, if, on the merits, the court finds the fiscal note and fiscal note summary to be sufficient, it should place this measure on the ballot with the fiscal note as prepared. It makes no difference who wrote it.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on June 21, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 1,196 words.

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